Supreme Court, U.S.
FILED

09-926 FEB 1 - 2010

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# In the Supreme Court of the United States

ROBERT HARPER,

*Petitioner,*

*v.*

SHERIFF OF COOK COUNTY AND COUNTY OF COOK,

*ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Is compliance with the requirements of Rule 23(c)(1)(B) of the Federal Rules of Civil Procedure a jurisdictional prerequisite to interlocutory review under Rule 23(f) of an order allowing a case to proceed as a class action?

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## PETITION FOR WRIT OF CERTIORARI

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Petitioner Robert Harper, individually and for the putative plaintiff class, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on September 8, 2009.

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 581 F.3d 511. The opinion of the district court (Pet. App. 10a-17a) is not officially reported but is available at 2008 WL 4686148.

## JURISDICTION

The judgment of the court of appeals was entered on September 8, 2009. A petition for rehearing was denied on November 3, 2009. (Pet. App. 18a.). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## RULE INVOLVED

This case involves Rule 23 of the Federal Rules of Civil Procedure, reproduced at Pet. App. 19a-25a.

## STATEMENT

Petitioner Robert Harper was arrested without a warrant by a Chicago police officer on September 29, 2005. Petitioner appeared before a judge at about 1:00 p.m. the next day for the hearing on probable cause required by *Gerstein v. Pugh*, 420 U.S. 103 (1975). The judge found probable cause to detain and set a cash bond.

Petitioner's spouse sought to post cash bond immediately after the hearing. The Sheriff of Cook County, however, requires that arrestees be processed into the Cook County Jail before bond may be posted.[1] As a result of this policy, petitioner was not released on bail until about 11:00 p.m., even though his spouse had been ready to post cash bond at 1:00 p.m. that same day.

Arrestees being processed into the jail are held in overcrowded and unsanitary animal cages, with nonfunctioning and overflowing toilets, and are subjected to verbal and physical abuse by correctional officers.[2]

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[1] This policy is set out in a written directive (known as "General Order 13.1 III (B)") of the Cook County Department of Corrections. Petitioner provided a copy of the rule to the Seventh Circuit in the appendix to his brief. Brief for Plaintiff-Appellee in No. 08-3413 (7th Cir), Short Appendix 1-7.

[2] Petitioner supported these allegations in the district court with sworn declarations from 15 members of the putative class.

Petitioner brought suit under 42 U.S.C. § 1983, alleging that the Sheriff's policy of processing arrestees into the jail before allowing the arrestee to be released on bail results in unreasonable seizures, contrary to the Fourth Amendment. Petitioner alleged that the Sheriff did not apply this policy to persons of wealth, clout, or political influence; petitioner asserted that this disparate treatment had deprived him and other similarly situated of equal protection of laws, as guaranteed by the Fourteenth Amendment.

Petitioner asked the district court to allow the case to proceed as a class action for "all persons processed into the Cook County Jail on and after May 2, 2005, while that person, or someone acting on his (or her) behalf, sought to post cash bond." (Pet. App. 12a.)

The district court found that the proposed class satisfied the numerosity requirement of Rule 23(a)(1) (Pet. App. 12a), and presented common questions of law and fact, as required by Rule 23(a)(2).[3] (Pet. App. 14a.) The

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[3] The district court accepted the 6 common questions framed by petitioner (Pet. App. 14a):

(1) whether there is any legitimate need to assign a jail identification number to any arrestee who is ready, willing, and able (either individually or through a friend or family) to post bond;

(2) whether Defendants refuse to accept cash bond until late in the afternoon, resulting in several hours of detention for an arrestee that is ready, willing, and able to post cash bond;

(3) whether persons with wealth, clout, or political influence are allowed to immediately post bond with the assignment of a jail identification number and without being processed into the jail;

(4) whether there is a lawful justification for the lengthy continued detention after bond has been posted;

(5) whether the Defendants apply or enforce the policy alleged in the Complaint and does that policy result in a deprivation of rights secured by the Fourth Amendment; and

(6) whether the Defendants apply a different policy to persons of wealth, clout, or political influence and does that disparate treatment amount to the denial of equal protection under the law.

district court also found that the claims of the named plaintiff satisfied Rule 23(a)(3) because they were typical of those asserted for the class. (Pet. App. 14a-15a.) The district court likewise found that the named plaintiff and his attorneys would adequately represent the putative class, as required by Rule 23(a)(4). (Pet. App. 15a.)

The district court then turned to Rule 23(b)(3) and found that the case satisfied both the "predominance" and "superiority" requirements of the rule. (Pet. App. 15a-16a.) The district court concluded that plaintiff's proposed class definition was too broad, and directed plaintiff to submit an amended class definition. (Pet. App. 16a.)

Before petitioner submitted an amended class definition, respondents filed a petition for permission to appeal under Rule 23(f) of the Federal Rules of Civil Procedure. The court of appeals granted the petition, overruled petitioner's jurisdictional arguments, and concluded that the case could not proceed as a class action.

Petitioner argued to the court of appeals that it lacked jurisdiction to review the district court's ruling because the district court had not yet entered the order required by Rule 23(c)(1)(B).[4] Petitioner pointed out that Rule 23(f) authorized interlocutory review of "an order granting or denying class-action certification under this rule." Petitioner asserted that the order "granting class-action certification" contemplated by Rule 23(f) must comply with Rule 23(c)(1)(B) and define

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[4] Rule 23(c)(1)(B) requires that "[a]n order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g)."

the class and the class claims. The court of appeals rejected this jurisdictional argument.

The Seventh Circuit acknowledged that "the district court did not define the class as required by Rule 23(c)(1)(B)" (Pet. App. 4a), but held that the district court's order was reviewable under Rule 23(f) because the order stated "Plaintiff's Motion to Certify Case as a Class Action is granted." (Pet. App. 5a.) The court of appeals explained its ruling as follows:

> There is no doubt that the district court certified the class. Its order states: "Plaintiff's Motion to Certify Case as a Class Action is granted." This allowed the Sheriff to seek permission to file an interlocutory appeal. Harper argues that the Sheriff was required to wait until a new class definition was submitted. But Harper was charged with that responsibility and the Sheriff had only ten days in which to seek permission to appeal. The Sheriff waited as long as he could and acted properly. (footnote omitted)

The court of appeals then turned to the merits and concluded that the case could not proceed as a class action. The court did not reject any of the district court's findings, but considered *de novo* whether petitioner's "claim is suitable for disposition through the class action format." (Pet. App. 5a.)

The court of appeals stated that it "must decipher what [petitioner] is complaining about. (Pet. App. 5a.) Petitioner argued to the court of appeals that the core of his claim is the Sheriff's policy to process arrestees into the jail before allowing the arrestee to be released on bail. The Seventh Circuit refused to consider this theory of the case, stating that petitioner's view of the case involved "an issue that is not central to the litigation." (Pet. App. 7a.) Alternatively, the Seventh Circuit

stated that whether this policy resulted in detention for "an unreasonable amount of time" presented only "individual issues." (Pet. App. 8a.)

The court of appeals also rejected petitioner's Equal Protection challenge, concluding that "class action disposition is not a superior method of litigating this claim" because "the existence and illegality of the Sheriff's discriminatory practice can be satisfied in an individual suit without the management issues of a class action." (Pet. App. 9a.)

## REASONS FOR GRANTING THE PETITION

This case provides the Court with an opportunity to resolve a conflict between the circuits on an issue central to class action litigation. This issue arises from the 2003 amendments to Rule 23 of the Federal Rules of Civil Procedure which added Rule 23(c)(1)(b). The Court should resolve this conflict to ensure that the Rules of Civil Procedure are uniformly applied throughout the circuits.

### A. Class Actions under Rule 23

The Court thoroughly canvassed the characteristics of class actions under Rule 23 in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 , 613-20 (1997). Relevant to this case is the rule that "the Federal Rules of Civil Procedure give the proposed class representative the right to have a class certified if the requirements of the Rules are met." *United States Parole Commission v. Geraghty*, 445 U.S. 388, 403 (1980).

The requirements for class certification begin with the four prerequisites of Rule 23(a).[5] In addition, before allowing a case to proceed as a class action, the district court must find that the proposed class satisfies one of the subsections of Rule 23(b).[6] The latter determination involves the balancing of many factors, and "is commit-

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[5] Rule 23(a) provides as follows:

(a) Prerequisites.

One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable,

(2) there are questions of law or fact common to the class,

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

[6] Petitioner sought class certification under Rule 23(b)(3), which requires that

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

ted in the first instance to the discretion of the district court." *Califano v. Yamasaki*, 442 U.S. 682, 703 (1979).

Before the 1998 amendments to Rule 23, a district court's decision to grant or to deny class certification could only be reviewed on an interlocutory appeal under 28 U.S.C. §1292(b) or on an appeal from the final decision. *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978). This changed in 1998.

### B. The 1998 Amendments Adding Rule 23(f)

Rule 23 was amended in 1998 to add Rule 23(f), a new provision allowing permissive interlocutory appeals from orders granting or denying class certification.[7] The rule requires that a petition for permission to appeal be filed within 14 days after entry of an order granting or denying a motion for class certification.

Rule 23(f) does not require the district court to "certify the certification ruling for appeal." Advisory Committee Notes to 1998 Amendments adopting Rule 23(f). The drafters of the amendment recognized, however, that "the district court often can assist the parties and court of appeals by offering advice on the desirability of appeal." *Id.* This form of assistance is mandated in the 2003 amendments to Rule 23.

### C. The 2003 Amendment Adding Rule 23(c)(1)(B)

Rule 23(c)(1)(B) is one of the provisions concerning the management of class actions added in 2003. The drafters of 2003 amendments viewed their work as "a balanced and neutral attempt to protect individual class members, enhance judicial oversight and discretion, and further the overall goals of the class-action device —

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7 The rule allows the court of appeals "unfettered discretion whether to permit the appeal, akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari." Advisory Committee Notes to 1998 Amendments adopting Rule 23(f).

efficiency, uniform treatment of like cases, and access to court for claims that cannot be litigated individually without sacrificing procedural fairness or bringing about other undesirable results." Report of the Judicial Conference Committee on Rules of Practice and Procedure (Sept. 2002) at 9.

Rule 23(c)(1)(B) specifies the contents of an order certifying a class-action and provides as follows:

> An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

The drafters of Rule 23(c)(1)(B) explained that the new rule "facilitates application of the interlocutory-appeal provision of Rule 23(f) by requiring that a court must define the class it is certifying and identify the class claims, issues, and defenses." Report of the Judicial Conference Committee on Rules of Practice and Procedure (Sept. 2002) at 11. This subsection provides "a written baseline against which to measure the propriety of the certification or noncertification order," *In re New Motor Vehicles Canadian Export Antitrust Litigation*, 243 F.R.D. 17, 18 (D.Me. 2007), and allows the appellate court to "adequately review the certification on appeal under Rule 23(f)." *Beck v. Maximus, Inc.*, 457 F.3d 291, 297 (3d Cir. 2006). Rule 23(c)(1)(B) has not, however, been uniformly applied.

### D. The Inter-Circuit Conflict about Rule 23(c)(1)(B)

Rule 23(c)(1)(B) was first analyzed by the Third Circuit in *Wachtel v. Guardian Life Ins. Co. of America*, 453 F.3d 179 (3d Cir. 2006). The court recognized that most class certification orders entered before adoption of Rule 23(c)(1)(B) did not meet the standards of the new rule; the typical order would be a memorandum opinion "discussing the allegations in the complaint, the

facts of the case, and some combination of the substantive provisions for class certification found in Rule 23(a) and (b)." *Id.* 185. As the Third Circuit explained:

> At the conclusion of this type of opinion, or in an accompanying certification order, the court typically states that it is certifying "the following class," or uses some equivalent language, followed by a block paragraph describing precisely those individuals to be included as part of the relevant class or classes. Although examples of common claims, issues, or defenses presented by the case may be discussed as part of the court's commonality, typicality, or predominance analysis, certification orders and memoranda are most often devoid of any clear statement regarding the full scope and parameters of the claims, issues or defenses to be treated on a class basis as the matter is litigated.
>
> *Wachtel, supra,* 453 F.3d at 186.

The Third Circuit concluded that this type of order does not comply with Rule 23(c)(1)(B). The court of appeals concluded, based on the language used in the rule, as well as the "apparent purpose and goals of amending the Rules," 453 F.3d at 186-87, that an order certifying a class action "must include (1) a readily discernible, clear, and precise statement of the parameters defining the class or classes to be certified, and (2) a readily discernible, clear, and complete list of the claims, issues or defenses to be treated on a class basis."[8] *Id.* at 187-88.

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[8] The Third Circuit noted that "no particular format is necessary in order to meet the substantive requirement of the Rule." *Wachtel,* 453 F.3d at 188 n.10. In a subsequent decision, that court held that Rule 23(c)(1)(B) is satisfied when the district court states the parameters of the class and outlines how the plaintiffs' claims and the defendants' affirmative defenses "would proceed on a class

An order that fails to meet these standards is not subject to review under Rule 23(f). *Id.* at 189-90.

The First Circuit has endorsed the *Wachtel* standard for Rule 23(c)(1)(B), recognizing that the rule "was added, at least in part, to help appellate courts reviewing an order better understand the district court's decision." *In re Pharmaceutical Industry Average Wholesale Price Litigation*, 588 F.3d 24, 40 (1st Cir. 2009).

The Seventh Circuit in this case afforded a much different construction to Rule 23(c)(1)(B). The court of appeals acknowledged that "the district court did not define the class as required by Rule 23(c)(1)(B)," (Pet. App. 4a), and asserted that it was required to "decipher what [petitioner] is complaining about in order to determine whether his claim is suitable for disposition through the class action format."[9] (Pet. App. 5a.)

The Seventh Circuit held that it had jurisdiction under Rule 23(f) to review the district court's order even though the district court's order did not comply with Rule 23(c)(1)(B). The court of appeals held that the district court's order could be reviewed under Rule 23(f)

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wide basis." *In re Constar International Inc. Securities Litigation*, 585 F.3d 774, 782 (3d Cir. 2009).

[9] Petitioner described the official policy and practice he was challenging in his opening brief in the Court of Appeals as follows:

> Plaintiff was held at the jail for ten hours after bond was set because of General Order 13.1 of the Cook County Department of Corrections, reproduced in Appellee's Short Appendix, *infra*, 1-7. This rule requires that before an arrestee can be released on bond, he (or she) "must be assigned a Cook County Department of Corrections identification number and be processed." (General Order 13.1 III(B), Appellee's Short Appendix 2.) Thus, "no one can be released until they get their unique ID number (CIMIS) for jail detainees." (Record Item 32 at 4.)
>
> Brief for Plaintiff-Appellee in No. 08-3413 (7th Cir), p. 4.

because it stated "Plaintiff's Motion to Certify Case as a Class Action is granted." (Pet. App. 5a.)

The decision of the court of appeals in this case means that an order certifying a class action need not define the class nor identify the class claims, issues, and defenses. All that is required by the Seventh Circuit's interpretation of Rule 23(c)(1)(B) to permit interlocutory review is that the district court's order state that the "motion is granted." This construction of Rule 23(c)(1)(B) reduces the rule to mere precatory language.

The salutary objective of Rule 23(c)(1)(B) to facilitate appellate review is disserved by the Seventh Circuit's interpretation of that rule. The court of appeals in this case refused to accept petitioner's formulation of the class issues, see *ante* at 11 & n.9, and made a *de novo* determination of whether the case "is suitable for disposition through the class action format." (Pet. App. 5a.) Had the court of appeals postponed appellate review until the district court entered an order complying with Rule 23(c)(1)(B), the Seventh Circuit would presumably have limited its review to whether the district court had abused its discretion in certifying the case as a class action to adjudicate the "class claims" described in the Rule 23(c)(1)(B) order. Such review would not have found any abuse of discretion and would have affirmed the order certifying the class.

The conflict about the meaning of Rule 23(c)(1)(B) is squarely presented in this case and should be speedily resolved before uncertainty about the meaning of the rule permeates the lower federal courts.

## CONCLUSION

It is therefore respectfully submitted that the petition for writ of certiorari should be granted.

February, 2010

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